

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1302

To be argued by
FRANK A. LOPEZ

In The
United States Court of Appeals
For The Second Circuit

THE UNITED STATES OF AMERICA,

Appellee.

-against-

FELIX ORTIZ,

Appellant.

*On Appeal from the United States District Court For the
Southern District of New York.*

**BRIEF IN BEHALF OF APPELLANT
FELIX ORTIZ**

FRANK A. LOPEZ
Attorney for Appellant
31 Smith Street
Brooklyn, New York 11201
(212) 237-9500



LEONARD FUSFIELD
Of Counsel

(9749)

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IN THE UNITED STATES COURT OF APPEALS
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THE UNITED STATES OF AMERICA,

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On Appeal from the United States District Court
For the Southern District of New York

BRIEF IN BEHALF OF APPELLANT FELIX ORTIZ

Preliminary Statement

The defendant-appellant Felix Ortiz*, appeals from the denial of the motion to suppress evidence, heard before the Honorable Thomas P. Griesa, District Judge, in the United States District Court for the Southern District of New York, on March 10th, 1976, denying the suppression of evidence as to contraband and statements made by Ortiz.

Ortiz, thereafter, and on March 11th, 1976, pleaded guilty to the second count of the indictment charging him with a substantive violation of the Federal narcotics laws in that Ortiz possessed with the intent to sell heroin in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A), preserving upon

* Hereinafter referred to as "Ortiz".

stipulation of the parties and the Court consenting, Ortiz's right to appeal the denial of the motion to suppress.

Judgment against Ortiz was pronounced on April 19th, 1976, with the imposition of a sentence of five years and a special parole of three years to commence upon expiration of confinement, said sentence to run concurrent with a New York State sentence Ortiz was then presently serving.

A timely notice of appeal was filed.

STATEMENT OF THE CASE

1) The evidentiary hearing on the Motion to Suppress Evidence.

On October 30th, 1975, Donald Alfred Klopfer, Investigator with the New York City Police and Special Agent John Mullin, debriefed an informant whom they had arrested the previous day for possession of heroin (7,8).^{*} He informed them that his source for the heroin was a person who he knew only by the name of "Felix" (9). The informant gave the law enforcement officers a general description of the individual, further stating that "Felix" was on a work release program connected with the New York State Correctional Institute at 550 West 20th Street, New York City. He stated that "Felix" would live in Queens if he were not on the work release program and that he worked in a

^{*} References are to the original transcript of the motion to suppress reproduced in the appellant's appendix.

Spanish grocery store on South 5th Street at Hooper in Brooklyn (9,10). Klopfer further testified that the informant he arrested told him that "Felix" used his late model Buick Electra to deliver the drugs but that although he had a New York plate he did not know the plate number (11). According to the informer, Ortiz would place the heroin in either brown paper bags or a shopping bag (11). The officer indicated that the informant further stated that he believed that "Felix's" sources were two Cuban males from lower Manhattan who transported the heroin from California (11,12).

Klopfer, investigating, discovered only one "Felix" on the work release program; that his wife lived in Queens; that he fit the general description given them and that he owned a Buick Electra with New York plates (13,14,16). The officer subsequently observed the vehicle on a couple of occasions in Queens and on one occasion observed Ortiz enter the vehicle on South 5th near Hooper and go into a bar near the Williamsburgh bridge. He exited the bar a short time thereafter, drove across the Williamsburgh Bridge, parked his car and walked toward the work-release facility (17,18,19).

At 10 A.M., on November 17th, 1975, Investigator Klopfer, Special Agent Mullin and Officer Burbage saw Ortiz get into his car in Queens, drive over the Williamsburgh Bridge and stop

on Seventh Avenue near 58th Street in Manhattan (20,24,25,26). A male entered Ortiz's car and shortly thereafter another male carrying a brown paper bag entered the vehicle while it was stopped on Seventh Avenue (28). Subsequently, these men exited from the vehicle and neither of them carried the brown paper bag (28,30). It was approximately 11:45 in the morning (30).

The officers observing the incident lost sight of the men who exited from Ortiz's vehicle. Ortiz drove his car and the officers followed in their vehicle. At approximately 11:45 a.m. as Ortiz was nearing the Queens Midtown Tunnel the officers pulled their vehicle directly in front of Ortiz's automobile. Officer Burbage approached from the passenger side, opened the door and reached across removing a brown paper bag from the floor by the driver's seat (30,31). Klopfer told Ortiz to step out while Burbage opened the package and saw what he believed to be heroin (32). Burbage then placed Ortiz under arrest. Investigator Klopfer then frisked Ortiz and in his left front coat pocket found another package of what he believed to be brown rock heroin (32).

After his arrest, and at the office of the law enforcement agents' Ortiz was read Miranda warnings and thereafter gave an inculpatory statement. Klopfer testified that Ortiz stated that he received a call at 9 o'clock that morning ad-

vising Ortiz that later that day he was to receive a package of heroin in midtown Manhattan. He was to return later that night at another location and give them \$45,000 in cash (35,36).

Thereafter, Ortiz gave written authorization for the agents to use his vehicle in furtherance of their investigation as well as written authorization to examine his safe deposit box and answered queries as to its contents (37).

Detective Klopfer testified that he had never met the informant prior to his arrest nor did he ever previously give any information (49). He was not a registered informant (50). Klopfer stated that the informant was absolutely an unknown quantity as far as his reliability was concerned (50). Detective Klopfer also indicated that the informant provided no information with regard to any future activities involving Ortiz (50,51). The officers did not verify the information that two Cubans from lower Manhattan were Ortiz's source of supply (51).

At no time did Klopfer see Ortiz receive any brown paper bags for the time interval between October 30th and November 17th, 1975 (51). There were people walking on the street on Monday, November 17th, 1975, at midday but Klopfer did not remember whether there were many people carrying packages (52). Detective Klopfer gave the order to stop the Ortiz vehicle

based on the information he received from the informant on October 30th, 1975, and upon another prior surveillance on November 13th, 1975, at which he was not present (53). The two individuals who entered Ortiz's vehicle on November 17th, were unknown and the officer was not able to associate either of them with the narcotic traffic (53). Klopfer did not know whether these men had secreted the package in their clothing when they left the car and he assumed that the package was left with Ortiz (54). Although Klopfer's information was that Ortiz was carrying on his transactions in lower Manhattan, this observation upon which the arrest is predicated was made in midtown Manhattan (54). From October 30th, 1975 to November 17th, 1975, Klopfer never attempted to obtain an arrest or search warrant (55).

Upon redirect examination Detective Klopfer testified that Police Officer Frank Berberich told him that his surveillance on the night of November 13th, 1975, revealed Ortiz removing a brown paper bag or shopping bag or something similar, from the trunk of one vehicle and handed it to a person inside his own Buick who then placed the package in the trunk of the Buick (73). This took place on South 5th Street between Hooper and Keap Streets in Brooklyn (73). Based on that information Klopfer did not make an application for a search or

arrest warrant on Ortiz nor did he know whether there was any attempt to search or arrest Ortiz at that time (74).

ARGUMENTPOINT I

THERE WAS INSUFFICIENT PROBABLE
CAUSE FOR EITHER THE ARREST OR
SEARCH.

Obviously the Court below justifies the arrest and search of Ortiz and his vehicle on probable cause since there is no claim here that the law enforcement officers effected Ortiz's arrest pursuant to warrant. We are, therefore, dealing in the area of warrantless arrest, search and seizure.

It is obvious likewise that when Ortiz was stopped by federal agents he was for all practical purposes arrested. In Henry v. United States, 361 U.S. 98 (1959), officers stopped defendant's car and the Court commented, "When the officers interrupted the two and restricted their liberty of movement, the arrest, for purposes of this case, was complete." We cannot justify the halting of the Ortiz vehicle on the basis for detention for investigation or to satisfy the hunch or curiosity of the observing officers. Taylor v. Arizona, 471 F.2d 848 (9th Cir. 1972); United States v. Gonzales, 362 F. Supp. 415 (S.D.N.Y. 1973). Naturally, it follows if the arrest was without probable cause, the subsequent search was unlawful, Henry v. United States, supra; Beck v. Ohio, 379 U.S. 89 (1964).

It is also elementary that an arrest cannot be justified by what a subsequent search discloses. Johnson v. United States, 333 U.S. 10 (1948); Henry v. United States, *supra*.

We commence our consideration of the facts in this case with the assumption that a warrantless arrest or search is presumptively illegal. Katz v. United States, 389 U.S. 347, 357 (1967). This is equally true where the arrest is of occupants of an automobile. Coolidge v. New Hampshire, 403 U.S. 443 (1971) Cf. Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973) ("Automobile or no automobile, there must be probable cause")

There are of course a number of situations in which Courts will sanction a warrantless arrest and/or search despite that it is per se unlawful. Agnello v. United States, 269 U.S. 20 (1925). When it is reasonable to act without warrant must of course be examined within the facts of each case among accepted guideline. Draper v. United States, 358 U.S. 307 (1959); Dumbra v. United States, 268 U.S. 435 (1925); Brinegar v. United States, 338 U.S. 160 (1949).

An examination of the elements and circumstances in this case is at this time necessary.

(1) The Informer.

The Government admitted that an informer, not proven reliable, furnished them with information regarding the narcotic activities of Ortiz. At this juncture, the informant's reliability was unverified. We are unaware that his identification of the person designated as Ortiz was actually the one the informer claimed was involved in narcotics. We do know that he gave no specific information with regard to any narcotics being sold or transferred to Ortiz on November 17th, 1975, nor for that matter did the informant provide any information with regard to the two individuals Ortiz met shortly before noon in midtown Manhattan. The agents could not identify these persons until after Ortiz's arrest.

Moreover, the movements of Ortiz, his meetings with two individuals and the transfer of a brown paper bag were at best discovered by the agents as a result of surveillance and not the result of any advance tip on the part of the informant. The informant gave no predictions as to what was to transpire on November 17th, which could be checked and verified by the agents. Although in Draper v. United States, 358 U.S. 307 (1959), some authorities claim that probable cause may be established if based on information supplied by a reliable

informer. The Supreme Court clarified in Ker v. California, 374 U.S. 23, 26 (1963):

"In Draper v. United States, 358 U.S. 307 (1959) we held that information from a reliable informer, corroborated by the agents' observations as to the accuracy of the informer's description of the accused and of his presence at a particular place, was sufficient to establish probable cause for an arrest without warrant."

It is clear that not only must the informant be credible, his information must likewise be reliable. Aquilar v. Texas, 378 U.S. 108 (1964) and Rugendorf v. United States, 376 U.S. 528; Wong Sun v. United States, 371 U.S. 471.

(2) The November 13th, 1975, Observation.

There is no substantive count involving November 13th, 1975, nor is it claimed by the Government that drugs were seen or seized from Ortiz on that date. The brown paper bag observed on this occasion has nothing to do with the brown paper bag on November 17th, 1975, for the obvious reason that on the 13th, Ortiz was observed removing it from a car, while on the 17th, the Government claimed he received another bag from two unknown individuals at the time. Clearly, there is no contention that it was the same bag. Moreover, Ortiz was known to have worked in a grocery store.

(3) The November 17th, 1975, Observations, Search/Arrest.

The surveillance of Ortiz took agents to midtown Manhattan where Ortiz met two other individuals. The agents overheard no conversations. They saw the two unknown males enter Ortiz's car with a brown paper bag before noon in midtown Manhattan in the vicinity of 55th Street and Seventh Avenue. The agents attempted to effect no arrest at this time. The same two individuals exited Ortiz's vehicle and left the area and headed uptown. Ortiz also left in his car and travelled south and east to the Queens Midtown Tunnel. At this time, the agents made their move and intercepted Ortiz at 1st Avenue and 34th Street, Manhattan. They arrested him and searched the car and his person. They seized the brown paper bag with heroin and additional heroin from the person of Ortiz.

Essentially the probable cause claimed by the Government amounts to (1) background information as to Ortiz's narcotic activities furnished by a untested unregistered informant; and (2) a meeting by Ortiz with two individuals in midtown Manhattan around noon, wherein he received a brown paper bag. Basically this was the entire motivation for the arrest and search of Ortiz, minutes later. Dispositive of the probable cause issue in this case is United States v. DiRe, 332 U.S. 581 (1948); United States v. Gonzales, supra, Sibron v. New

York, 392 U.S. 40 (1968).

In applying the test under the Fourth Amendment, probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. Draper v. United States, supra. Nothing remotely approaching that existed in this case. Cf. Gonzales v. United States, supra; Henry v. United States, supra; Beck v. Ohio, supra.

CONCLUSION

The motion to suppress physical evidence and statements should have been granted and the Judgment below should be reversed and the indictment dismissed, together with such other and further relief as may be just and proper.

Dated: July 22, 1976

Respectfully submitted,

FRANK A. LOPEZ
Attorney for Appellant
Felix Ortiz

LEONARD FUSFIELD
Of Counsel

U. S. COURT OF APPEALS 2nd CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee

- against -

FELIX ORTIZ,

APPELLANT.

Index No.

76-1302

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York

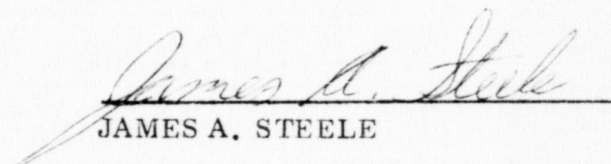
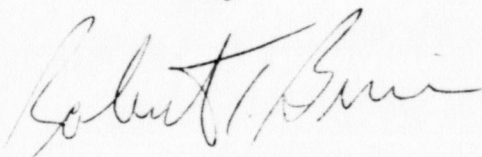
That on the **21st** day of **July** 19**76** at **St. Andrews Plaza**

deponent served the annexed *Appellate Brief* upon

Robert Fiske, United States Attorney

the in this action by delivering 2 true copies thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein.

Sworn to before me, this **21st**
day of **July** 19**76**


JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977